

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 19-084

PENNICHUCK WATER WORKS, INC.

Request for Change in Rates

Order Approving Temporary Rates

ORDER NO. 26,373

June 30, 2020

APPEARANCES: NH Brown Law, by Marcia A. Brown, Esq., for Pennichuck Water Works, Inc.; Steve Bolton, Esq., for the City of Nashua; the Office of the Consumer Advocate by Christa Shute, Esq., on behalf of residential ratepayers; and Staff of the Public Utilities Commission by Christopher R. Tuomala, Esq.

In this order, the Commission authorizes Pennichuck Water Works to implement temporary rates at the same level as current rates, on a service rendered basis, effective April 14, 2020. As a result, the bill for an average metered customer will remain unchanged until the conclusion of this proceeding. The temporary rates are subject to reconciliation back to April 14, based on the outcome of the permanent rate case.

I. PROCEDURAL HISTORY

On July 1, 2019, PWW filed a petition seeking a permanent rate increase for all customer classes and further modification to its ratemaking structure. PWW requested an increase of \$3,778,139, an 11.91 percent increase in its revenue requirement, effective August 1, 2019. The proposed permanent rate increase of 11.91 percent includes a 2019 Qualified Capital Project Adjustment Charge (QCPAC) surcharge of 4.06 percent. *See Pennichuck Water Works, Inc. Order No. 26,298 (October 9, 2019) (approving current QCPAC charge).*¹ At the time of filing, PWW stated that it was not seeking temporary rates in light of its ongoing QCPAC program.

¹ The QCPAC is an annual surcharge mechanism the Company employs to fund assets placed in service during each fiscal year between general rate proceedings. *See Pennichuck Water Works, Inc., Order 26,128 (May 3, 2018) (providing additional QCPAC background).*

The Commission issued Order No. 26,279 on July 31, which suspended PWW's proposed tariff for twelve months and scheduled a prehearing conference for October 3.

On March 16, 2020, the Company filed a partially-assented to motion for temporary rates, which included supporting testimony and proposed tariff pages with an effective date of that same day. The OCA partially objected to the temporary rate filing on March 26, and the Company filed a response the next day.

The Commission issued Order No. 26,348 on April 13, 2020, suspending the proposed temporary rate tariffs and scheduled a hearing for May 13. On April 14, PWW published the Commission's Order on its website and posted a customer notice on the Company's website and Facebook page. The Company also mailed a hard copy of the customer notice to all of its customers by April 16. The Company filed its report of customer notice on April 16, 2020.

On May 11, 2020, PWW, on behalf of the parties, filed a Settlement Agreement (Settlement Agreement) regarding temporary rates. The Settlement Agreement addressed the agreed-upon propriety of temporary rates, but left the effective date of those rates to be litigated at the scheduled hearing.

PWW's request for permanent and temporary rates, and related docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted at <https://www.puc.nh.gov/Regulatory/Docketbk/2019/19-084.html>.

II. POSITIONS

A. Temporary Rates

Pursuant to the Settlement Agreement, the Company, the OCA, the City of Nashua (Nashua), and Staff (collectively the Settling Parties) all agreed that the Commission should grant PWW temporary rates at current rates for the pendency of PWW's rate proceeding. Pennichuck Water Works, Inc., Settlement Agreement at 4 (May 11, 2020). The Settling Parties agreed that, pursuant to the Company's ratemaking mechanism approved in Order No. 26,070

(November 7, 2017), the Company experienced a revenue deficiency of \$890,466 by the end of 2018. *Id.* at 3. Staff further explained the deficiency calculation at hearing, stating that the figure was based primarily on the Company’s 2018 annual report and “corroborated against the Company’s [permanent] rate filing.” Hearing Transcript of May 13, 2020, at 45-46. The calculation of the \$890,466 revenue deficiency corrected the Company’s initial temporary rate filing which referenced a negative net earning of \$30,861. *Id.*; Pennichuck Water Works, Inc., Partially-Assented to Motion for Temporary Rates at 2 (March 16, 2020).

The Settling Parties also agreed – as testified to by Staff and the Company – that temporary rates set at current rates are just and reasonable. According to the Settling Parties, given the recoupment mechanism afforded under RSA 378:29, the rates will yield operating revenues sufficient to enable the Company to pay its operating expenses, debt service requirements, and its share of Nashua’s bond obligation to purchase the Company and its affiliates.

B. Effective Date

1. PWW

The Company argued that the effective date should coincide with the date of its temporary rate filing, March 16, 2020. In its temporary rate filing, PWW relied on RSA 378:1, the Commission’s authority to establish just and reasonable rates, and RSA 378:3 (“[u]nless the commission otherwise orders, no change shall be made in any rate, fare, charge or price, which shall have been filed or published by a public utility in compliance with the requirements hereof, except after 30 days’ notice to the commission and such notice to the public as the commission shall direct”). PWW relied upon *Appeal of Pennichuck Water Works*, 120 N.H. 562, 567 (1980),

which held that the permanent rate filing is the earliest date on which the Commission can order temporary rates to take effect.

The Company noted that it filed its permanent rate filing on July 1, 2019, for a month later on August 1. Based on the *Appeal of Pennichuck Water Works* holding, the Company argued its temporary rate filing is analogous to a permanent rate filing, thus an effective date could be set for the date on which the request for temporary rates was filed. PWW further noted that the temporary rate filing was well after its initial permanent rate filing and Commission notice of July 31, 2019.

In its reply to the OCA's objection, PWW requested that the Commission exercise "its plenary authority to set rates and allow reconciliation or recovery of unbilled revenues, so as to address the constitutional issue of confiscatory rates." *Pennichuck Water Works, Inc., Reply to the OCA's Objection* at 1 (March 27, 2020). PWW argued that the financial impacts of its response to the COVID 19 pandemic exacerbated the Company's financial situation. PWW also argued that each month of lost recoupment results in approximately \$260,000 in lost revenue to the Company, funds which if not recouped would need to be replaced by "new and additional borrowings." *Id.* at 3. The Company argued that if an effective date were set after March 16, 2020, notice to customers and regulatory lag would cause PWW to incur additional lost revenue.

At hearing, PWW renewed its arguments to set March 16, 2020, as the effective date. The Company also argued that the effective date was set as an agreement between the Company, Staff, and Nashua to avoid further litigation as to whether recoupment could be set back to that date under the temporary rate mechanism only, or through the Commission's plenary power to set rates. Finally, PWW argued that RSA 378:6, III ("[i]f for any reason the commission is unable to make its determination prior to the expiration of 6 months from the originally proposed effective date of a rate schedule, the public utility affected may place the filed schedule of rates

in effect [pending the suspension period] upon furnishing the commission with a bond”), allows for an even earlier effective date, and as such, should allow for a March 16, 2020, effective date.

2. OCA

The OCA argued that the effective date should be April 16, 2020, the date on which customers received notice of the Company’s temporary rate filing. According to the OCA, the phrase “after reasonable notice” in RSA 378:27 and the notice requirements of N.H. Admin. R., Puc 1604.03(a) are indications that the effective date of temporary rates follows notice.

The OCA also argued that the *Appeal of Pennichuck* should be viewed as a limitation on the Commission’s discretion provided in the “otherwise ordered” language of RSA 378:3, as that case did not address other relevant issues such as notice. The OCA, however, agreed that *Appeal of Pennichuck* further supports a Commission decision for a later effective date as it held that there is no constitutional requirement for the Commission to retrospectively correct a utility’s error in judgment, in this case PWW’s failure to file for temporary rates with its permanent rate filing.

The OCA said there can be no unconstitutional taking because no private property is at stake given PWW’s all debt and corporate structure. Last, the OCA urged the Commission to separate the issue of the Company’s need for temporary rates from its response to the COVID 19 crisis.

3. Staff

Staff argued that the effective date should coincide with the date of its temporary rate filing, March 16, 2020. At hearing, Staff based its position mainly on three arguments: 1) the holding from *Appeal of Pennichuck* allows for the effective date to be set back to the permanent rate filing, July 1, 2019; 2) past Commission practice in Docket No. DW 17-165 (setting an effective date almost three months prior to publication of a supplemental order of notice) and the remand resulting from *Appeal of Pennichuck* (where the effective date preceded the Company’s

temporary rate filing by two weeks); and 3) Staff's position was the product of agreement with the Company not to further litigate the issue of the effective date. Staff further argued that the requirements of RSA 378:27 were met as the Commission duly noticed and held the temporary rate hearing, to which no additional intervenors joined, before it issued its order regarding the request for temporary rates.

Last, Staff argued that the effective date should be set to March 16, 2020, as the Company loses out on much-needed revenue with each month that passes. Staff contended that additional revenue improves the Company's cash flow position and rating in the debt market, which ultimately benefits ratepayers.

4. Nashua

Per the Settlement Agreement, Nashua agreed with a March 16, 2020, effective date.

III. COMMISSION ANALYSIS

A. Temporary Rates

Unless precluded by law, informal disposition by stipulation may be made of any contested case at any time prior to the entry of a final decision or order. RSA 541-A:31, V(a). Pursuant to N.H. Admin. R., Puc 203.20(b), the Commission shall approve the disposition of any contested case by stipulation if it determines that the result is just and reasonable and serves the public interest. The Commission encourages parties to settle disagreements through negotiation and compromise because it is an opportunity for creative problem solving, allows parties to reach a result in line with their expectations, and is often a better alternative to litigation. *Hampstead Area Water Company, Inc.*, Order No. 26,131 at 3 (May 3, 2018). Nonetheless, the Commission cannot approve a settlement, even when all parties agree, without independently determining that the result comports with applicable standards. *Id.*

Pursuant to RSA 378:27, the Commission may approve temporary rates for the duration of a rate proceeding if the Commission finds that the public interest so requires and the reports of the public utility filed with the Commission indicate that the temporary rates are reasonable. The standard for approval of temporary rates, which are reconcilable, is less stringent than that for permanent rates. *Appeal of Office of Consumer Advocate*, 134 N.H. 651, 660 (1991) (citing *New Eng. Tel. & Tel. Co. v. State*, 95 N.H. 515, 518 (1949)).

The Settlement Agreement requests that the Commission approve temporary rates at the level of current rates. The Settling Parties all agreed that, according to the Company's books and records, PWW experienced a revenue deficiency of \$890,466 by the end of 2018. Staff further testified at hearing that the information was gleaned from the Company's 2018 annual report and validated against its rate case filing.

We find that rectifying the apparent revenue deficiency experienced by the Company would be in the public interest. Taking into consideration that temporary rates will be set at current rates, and thus customers will not experience a bill increase at this time, we find that temporary rates set at current rates are just and reasonable under the circumstances.

Accordingly, we find the Settlement Agreement just and reasonable and in the public interest, and approve the temporary rate request, subject to reconciliation.

B. Effective Date

We next consider the effective date. RSA 378:27 allows the Commission to authorize effective dates as early as the filing date of the petition for permanent rate change. *See Appeal of Pennichuck Water Works*, 120 N.H. 562, 567 (1980) (filing date is earliest date on which PUC may order temporary rates to take effect). The Company, along with Staff and Nashua, requested that the effective date be set on the date of the temporary rate filing, March 16, 2020. The OCA, argued the effective date should coincide with the notice to customers mailed on

April 16, 2020. The OCA argued that the later effective date comports with Commission precedent and its rules, and that the Commission should not grant an exception.

At the time PWW filed its request for permanent rates the Company said it was not seeking temporary rates, and Order No. 26,279 reflected that. PWW later requested temporary rates on March 16, 2020. The Commission customarily requires notice of temporary rates under N.H. Admin. R., Puc 1203.02, which requires notice to each customer, and Puc 1604.03, which requires notification by publication of the order of notice. On April 13, 2020, we issued Order No. 26,348, suspending the proposed temporary rates and scheduling a hearing on them. Order No. 26,348 required PWW to publish the Order on the Company's website no later than April 14, 2020. The Order was published by the Company on April 14. Although the Company provided notice to customers of the requested permanent rate increase when it filed its petition in July 2019, customers were also notified in Order No. 26,279, that the Company did not request temporary rates. Given the Company initially represented it would not seek temporary rates, we find it appropriate to set the effective date of temporary rates on the earliest date actual notice of temporary rates was provided, April 14, 2020.

We are mindful of the balance we must strike in our role as arbiter between the interests of the regulated utility and its customers under RSA 363:17-a. Setting the effective date on or after customers receive notice, provides customers the opportunity to adjust consumption behavior before assuming an increased rate, or in this case, a rate subject to recoupment.

We note the Company's argument, among others, that a possible constitutional taking would occur if an earlier effective date is not approved. We also recognize that the mechanism of temporary rates "foreclose[s] the utility from raising a constitutional issue of confiscation by guaranteeing it a minimum below which such temporary rates should" be set. *Public Service Co.*

of *N.H. v. State*, 102 N.H. 66 (1959). We are not persuaded, however, by PWW's argument, or the evidence presented in the Company's filings or presented at hearing, that the Company would experience an unconstitutional taking with an effective date of April 14, 2020. PWW could have requested temporary rates with its petition in July 2019, but did not.

Accordingly, the effective date is set as April 14, 2020.

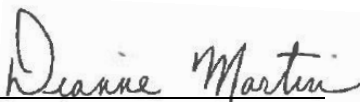
Based upon the foregoing, it is hereby

ORDERED, that the Settlement Agreement on temporary rates is **APPROVED**; and it is

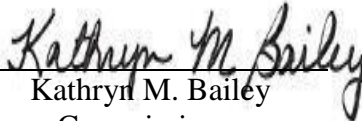
FURTHER ORDERED, that the temporary rates will be effective for service-rendered on April 14, 2020, subject to reconciliation pursuant to RSA 378:29 at the conclusion of the Pennichuck Water Works, Inc., permanent rate proceeding; and it is

FURTHER ORDERED, that PWW shall submit with the Commission properly annotated tariff pages consistent with this order within 15 days of the date of this order, as required by N.H. Admin. R., Puc 1603.

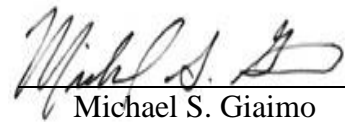
By order of the Public Utilities Commission of New Hampshire this thirtieth day of June, 2020.



Dianne Martin
Chairwoman

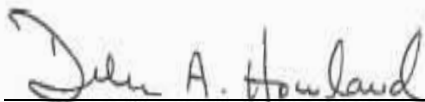


Kathryn M. Bailey
Commissioner



Michael S. Giaimo
Commissioner

Attested by:



Debra A. Howland
Executive Director

Service List - Docket Related

Docket# : 19-084

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